Tenth Circuits consider *all* state-law excessive damages standards to be substantive—*including* those state-law standards worded in terms similar to the federal standard—those courts would have applied the Puerto Rico excessiveness standard and evaluated the propriety of the award against HIMA by comparing it with awards in other Puerto Rico cases. *See Rustenhaven v. Am. Airlines, Inc.*, 320 F.3d 802, 805-06 (8th Cir. 2003) (applying the Arkansas excessive damages standard in a diversity action, even though the state-law standard was phrased similarly to the federal standard); *Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp.*, 315 F.3d 1271, 1281 (10th Cir. 2003) (same for New Jersey law).

The Sixth, Seventh, and Ninth Circuits may well have applied the federal excessiveness standard to evaluate the award against HIMA because they have each issued post-*Gasperini* opinions applying the federal standard in diversity actions without undertaking any *Erie* analysis. *See Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997) ("We use federal standards to determine excessiveness of verdicts in diversity cases."); *Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (same); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (same). Respondents point to decisions in which the Sixth, Seventh, and Ninth Circuits have applied state excessiveness standards in diversity actions. *See, e.g., Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2000). But even assuming that respondents have accurately characterized those cases,[3] the inconsistency *within* these circuits would only underscore the con-

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[3] For example, respondents rely on *Galam v. Carmel*, 249 F.3d 832 (9th Cir. 2001), which they characterize as holding that federal courts sitting in diversity must apply state substantive law regarding attorney's fees. Opp. 16. But *Galam* actually held that *federal* law governs when attorney's fees are awarded as a sanction for misconduct in federal court, *see* 249 F.3d at 838, and, in any event, the relevance of an attorney's fees case to this case is not readily apparent.

fusion over how to apply *Gasperini* and would further demonstrate the existence of a circuit split.

This Court's review is warranted to clarify when, under *Gasperini*, federal courts sitting in diversity must apply state-law excessiveness standards.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] Respondents argue that HIMA waived its right to request remittitur of the awards for future care and loss of income. Opp. 17. Although respondents contend that HIMA did not challenge the future medical care estimates included in the life care plan prepared by respondents' expert Dr. Woodrich, this is not accurate. HIMA filed two motions in limine to exclude Dr. Woodrich's testimony and again objected at trial; the district court denied each of these objections. Pet. App. 12a. Respondents state that HIMA did not object when the jury asked to view the life care plan during deliberations. But by that point in the proceedings, the district court had made its position abundantly clear by denying HIMA's three previous motions, and HIMA's objection had already been preserved for appeal. *See* Fed. R. Evid. 103(a). Moreover, HIMA again contested the calculation of future medical expenses on appeal, but the First Circuit rejected HIMA's argument on the merits. Pet. App. 13a.